No. 12692

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PALOMAS LAND AND CATTLE COMPANY, a Corporation,
Appellant,

vs.

ARTHUR D. BALDWIN, as Surviving Trustee Under a Certain Agreement of Trust Dated October 29, 1943; LOUIS A. SCOTT, JOHN L. RASBERRY and JAMES F. HULSE, Partners Doing Business Under the Firm Name and Style of Burges, Scott, Rasberry & Hulse,
Appellees.

APPELLANT'S REPLY BRIEF.

On Appeal From the United States District Court for the Southern District of California Central Division

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APPELLANT'S REPLY BRIEF.

Introduction.

A reading of the Brief of Appellee Arthur D. Baldwin (herein for convenience called "the Baldwin Brief") and the Brief of Appellees Louis A. Scott, John L. Rasberry and James F. Hulse (herein for convenience called "the Rasberry Brief") makes it apparent that the principal issue of the appeal—to wit, the personal disability of the trustee of an express trust to force his beneficiary to interplead with a hostile claimant to the trust funds—has not been met head-on. This omission, as well as what is believed to be misconstruction of the record and miscitation of authorities, requires reply.

I.

Trustee May Not Interplead Beneficiary and Stranger.

Appellees attempt to meet this point in three ways:

1. **The Argument Is Made That Once the Jurisdictional Requirements of the Interpleader Act Are Met, the Right to Maintain the Action Is Absolute** (Baldwin Br. p. 5).

Reduced to its absurd but logical conclusion, this thesis would require the assertion that, jurisdictional requirements being met, interpleader could be maintained even though there had been an express written waiver of the right, or even though the plaintiff in interpleader were an insane person!

The fact of the matter is that our federal courts recognize the principle that there may be grounds—personal to the plaintiff—which disable him from bringing the action. Thus for example, the only Circuit Court case cited by Appellees under the heading of *"Bona Fides"* (Baldwin Br. pp. 9-10), *Hunter v. Federal Life Ins. Co.,* 111 F. 2d 551 (1940) (C. C. A. 8th), recognizes the fact that the action must be brought in *good faith.* As stated in the *Hunter* cases, *supra,* at page 556:

> "It is our opinion that a stakeholder, *acting in good faith,*[1] may maintain a suit in interpleader for the purpose of ridding himself of the vexation and expense of resisting adverse claims, even though he believes that only one of them is meritorious."

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[1]Emphasis supplied here and elsewhere.

So, too, other federal cases enunciate the proposition that where there is no reasonable doubt as to the proper payee, the action may not be maintained.

> *Calloway v. Miles,* 30 F. 2d 14, 15 (1929) (C. C. A. 6th); (App. Op. Br. p. 35);
>
> *Mutual Life Ins. Co. of N. Y. v. Egcline, et al.,* 30 Fed. Supp. 738, 740, 741 (1939), D. C., N. D. of Calif. N. D. (App. Op. Br. p. 35).

Likewise, where the plaintiff is under an independent liability to one of the claimants, his right to bring interpleader is denied.

> *Boice v. Boice, et al.,* 48 Fed. Supp. 183, 186, D. C., D. N. J. (1943); aff'd 135 F. 2d 919 (C. C. A. 3rd) (App. Op. Br. p. 42).

The foregoing cases make it clear that "the question of the personal incapacity of a trustee-attorney to interplead his beneficiary-client with a hostile claimant is determined not by a meeting of the jurisdictional requirements of interpleader under the Act . . ." (App. Op. Br. p. 25.)

This would be true even though interpleader were considered (as asserted by appellees, Baldwin Br. pp. 6-8) a federal right. But, unlike the situation in *Holmberg v. Armbrecht,* 327 U. S. 392, 66 Sup. Ct. 582 (1946) (Baldwin Br. p. 7), involving a suit to enforce the special liability of bank stockholders created by a federal law (Fed. Farm Loan Act, 39 Stat. 360, 374, 12 U. S. C., Sec. 812, 12 U. S. C. A., Sec. 812), interpleader under the Act is not a unique federal right.

This Court in *Massachusetts Mutual Life Ins. Co. v. Morris, et al.,* 61 F. 2d 104, 105 (1932) (C. C. A. 9th), approved the principle here involved in the following language quoted from *Mutual Life Ins. Co. v. Bondurant,* 27 F. 2d 464, 465 (C. C. A. 6th), cert. denied 278 U. S. 630, 49 S. Ct. 30, 73 L. Ed. 548:

> " 'The Interpleader Act effects no important change in the substantive rights of parties to an interpleader suit; it merely enlarges the jurisdiction of federal courts over the necessary parties to certain interpleader suits.' "

To the same effect is:

> *Dee v. Kansas City Life Ins. Co.,* 86 F. 2d 813, 814 (1936) (C. C. A. 7th):
>
> "Interpleader is a well-established equitable remedy existing long prior to the enactment of the Statute referred to [44 Stat. 416, 28 U. S. C. A., Sec. 41(26)]. The latter enactment did not enlarge the remedial function of the action, but merely extended the jurisdiction of federal courts to the circumstances described in the Act."

Suffice it then, that the mere fact that the jurisdictional elements of interpleader are present, does not grant a trustee *carte blanche* to embroil his beneficiary in litigation with a stranger to the trust.

2. **It Is Next Asserted That, Well After All—This Trust Isn't a Trust in the First Place** (Baldwin Br. pp. 15-17; Rasberry Br. p. 2).

This strange assertion would seem to cast some reflection on the three sets of lawyers who drafted the instrument—Garfield, Baldwin & Vrooman; Burges, Burges, Scott, Rasberry & Hulse; and the attorneys for the Security-First National Bank of Los Angeles. It must be assumed that the attorneys (and their predecessors) represented by the appellees knew what they were doing—when, despite the many forms of settlement known to lawyers and the law—they advisedly created a trust agreement [Tr. pp. 46-52], complete with a conveyance in trust transferring title, the designation of trustees, prohibition against substitution of trustees except on stated conditions, designation of beneficiaries, place of preserving funds, and the clear statement that

> *"The trustees shall execute this trust without charge."*

The fact that it was not a trust for the investment and reinvestment of funds, as suggested by appellees (Baldwin Br. pp. 15-16), is completely immaterial.

> "The point I wish to make is this. A trust can be created for any purpose which is not against public policy or otherwise illegal." (*Scott on Trusts,* Vol. I, Sec. 59, p. 370.)

One can only conclude that the belated attempt to remove the trust label affixed to the instrument by appellees themselves, is a tacit confession of weakness.

3. **Finally, Appellees Assert There Is Authority for a Trustee Interpleading Beneficiary and Hostile Claimant.** (Baldwin Br. pp. 17-19.)

The cases cited do not support the contention:

(a) *Security Trust Co., etc. v. Woodward, et al.,* 73 Fed. Supp. 667 (D.C., S.D.N.Y., 1947) (Baldwin Br. pp. 17-18; App. Op. Br. p. 24), as pointed out in Appellant's Opening Brief, involved a *consenting beneficiary.* Though this is challenged by appellees (Baldwin Br. p. 18), it appears in the *Security Trust Co.* case that the beneficiary (Orator Frank Woodward) filed answer and cross-complaint, and that the motion to dismiss was filed by the stranger to the trust—Mary Trask Woodward.

(b) Neither *Blackmar v. Mackay, et al.,* 65 Fed. Supp. 48 (D.C., S.D., N.Y., 1946) (Baldwin Br. p. 18; App. Op. Br. p. 24) nor *Novinger Bank v. St. Louis Union Trust Co.,* 196 Mo. App. 335, 189 S. W. 826 (1916) involved strangers to the trust. As pointed out in Appellant's Opening Brief, the *Blackmar* case was a dispute *within the family* of trustee, settlor, and beneficiary. The *Novinger Bank* case was similarly a dispute *within the family:* between the trustee (under a corporate mortgage securing bonds) and two sets of beneficiaries (holders of the bonds).

(c) *United Building & Loan Ass'n v. Garrett,* 64 Fed. Supp. 460 (D.C., Ark., 1946) (Baldwin Br. p. 18) was not a case of interpleader brought by a trustee. The trustee was joined as a defendant and answered for the beneficiaries, thus performing the historic function of a trustee—at work for the bene-

ficiary, the antithesis of the trustee's role in the present action.

(d) *Warner v. Florida Bank & Trust Co.,* 160 F. 2d 766 (C.C.A. 5th, 1947) (Baldwin Br. p. 18), did not involve a trustee but an executor—type situation 2 (b) distinguished in Appellant's Opening Brief, pages 23-24.

(e) *Leber, et al. v. Ross, et al.,* 113 Atl. 606, 92 N. J. Eq. 535 (1921) (Baldwin Br. p. 19) did not involve an express trust. While at one point in the opinion the Court describes the fund holders as "trustees", the instrument involved makes no such statement, and is obviously lacking in the first essential of an express trust. The document—a receipt for $450.00 as part of an escrow—recites that the money is held as *"security."* Hence there could be no title in the asserted trustee, a requisite of the trust relationship, and trust principles would not dictate the answer (see: *Scott on Trusts,* Vol. I, Section 2.2, p. 31). If the assignor performed, she was to get the $450.00; if she failed to perform, the assignee was to get the money. The Court viewed the matter as an ordinary escrow: ". . . the position of complainants as custodians of part of the purchase price in this transaction is one of almost daily occurrence connected with the transfer of title to real estate . . ." (*Leber* case, *supra,* at p. 607.)

(f) In *Van Orden v. Anderson,* 122 Cal. App. 132, 92 Pac. 572 (1932) (Baldwin Br. p. 19) the trust had already terminated. As stated in the opinion at page 142:

> ". . . nevertheless where the purposes of the trust have been accomplished, or the *trust*

otherwise terminated (which was clearly the situation here), . . ."

It is submitted that—on principle—the trustee's duty of loyalty to his beneficiary bars an action of this sort, and that the argument on this point (App. Op. Br. pp. 23-30) has not been met by appellees.

II.
Action Not Brought in Good Faith.

1. The Trustee Has Already Rejected the Precise Claim Here Made.

In an attempt to extricate himself from the force of the above argument, Appellee Baldwin now asserts that when Appellee Rasberry's claim for direct payment was rejected on June 3, 1947, the trustee had not seen the purported letter agreement of August 6, 1943, between Appellant and Appellee Rasberry (Baldwin Br. pp. 12, 13). *But this novel contention is flatly contradicted by the sworn statement of Appellee Baldwin himself:* [Baldwin Affidavit, Rep. Tr. pp. 76-77]:

> "* * * that enclosed in the same envelope with said Exhibit 10 was another letter addressed to the Trustees from John L. Rasberry bearing date of May 31, 1947, and marked 'Confidential', a photostat of which letter is attached hereto and marked 'Exhibit 11'; *that attached to said letter was a certain employment agreement and assignment executed by Marshall B. Stephenson as President of Hueco Cattle Company addressed to Burges, Burges, Scott, Rasberry & Hulse,* assigning 15% of any sums realized by Palomas out of its claim made under the provisions of Public Law 814 in the event such matters are disposed of by litigation or settled by agreement

'after the filing of any suit or legal procedure'; that a photostat of said assignment is attached hereto and marked 'Exhibit 12'; *that in reply to said letters of May 31, 1947, attached hereto as Exhibits 10 and 11, said James R. Garfield, as Trustee, under date of June 3, 1937 [sic], advised said John L. Rasberry that the disbursement of the funds collected from said claim 'is to be made in accordance with the terms of the contract of October 29, 1943'; that a photostat of said letter is attached hereto and marked 'Exhibit 13';* * * *"

2. The Action Is Not Brought in Good Faith.

(1) Appellees assert that by certain papers filed with appellant's income tax returns, appellant admitted that an assignment had been made to Appellee Rasberry (Baldwin Br. p. 11; Rasberry Br. p. 3). Assuming the facts were as stated:

(a) There is not one shred of evidence in the entire record to indicate directly or indirectly that plaintiff had any knowledge of this matter when he filed suit, so it could not have affected in any respect his bona fides in bringing the action; and

(b) As pointed out both in argument [Tr. pp. 248-249] and in an affidavit of appellant's president [Tr. p. 167], appellant feels very strongly that an attorney entrusted with a client's confidential papers —to wit, income tax returns—violates his duty in disclosing the same, and that such matter does not rise to the dignity of "evidence" demonstrating the bona fides of either of appellees in bringing this action.

(2) Appellee Rasberry asserts—on the merits—that the letter of August 6, 1943, was in fact an assignment to him of a portion of appellant's award. Since, as pointed out, both appellees have acknowledged the impropriety of Appellee Rasberry's claim (App. Op. Br. pp. 32-34), it appears clear that this question—on the merits—had nothing to do with the bringing of the action. Nonetheless, since the point has been raised, what is the fact?

(a) The *conflicts* law of the forum governs (*Klaxon v. Stentor Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477).

(b) The conflicts law of the forum—California—specifies that since the alleged agreement fixes no place of performance, the law of the place of contracting governs (Civil Code, Sec. 1646).

(c) The agreement was made in Texas [Affidavit of Rasberry, Tr. p. 43].

(d) The Supreme Court of Texas, in rejecting the claim of an equitable assignment by a client's letter to the attorney reading in part ". . . *we agree to give you as compensation therefor 1/8 of the property recovered* . . .", enunciated the rule to be:

> *"In order that an agreement for a contingent fee may operate as an equitable assignment, there must be in effect a constructive appropriation of so much of the amount to be recovered as will confer upon the attorney a complete and present right to receive the same without the further intervention of the client."*
>
> *Carroll, et al. v. Hunt,* 140 Tex. 424, 430, 168 S. W. 2d 238 (1943).

(e) In the instant case, it affirmatively appears that *intervention of appellant was required in each instance* by execution of vouchers and endorsement of checks (1) before any sum at all could be obtained from the United States Government, and (2) before any sum at all could be obtained by Appellee Rasberry [Affidavit of Rasberry, Tr. pp. 29-44; Affidavit of Baldwin, Tr. pp. 68-84].

(f) It is submitted, therefore, that under the governing Texas law, the alleged agreement could not in any event have constituted an assignment to Appellee Rasberry, and Appellee Baldwin did not in fact so regard it.

III.

Plaintiff Has "Unclean Hands."

Intentionally or otherwise, both appellees have ignored the point made in Appellant's Opening Brief, pp. 38-41, that the Rasberry letter of May 31, 1947, copy of which was allegedly sent to appellant, requested direct payment *"for convenience,"* but in the "confidential" letter segregation of a portion of appellant's funds was claimed as a matter of right. And this "confidential" letter was designed to be—and in fact was—concealed from the client-beneficiary. Reasoning backwards, from his present knowledge of the confidential tax return, Appellee Baldwin argues that he was under no duty "to relay information to appellant that was already within appellant's knowledge" (Baldwin Brief, p. 15). But even if there were any justification for presently considering that tax return, the plain fact is that at the time he was asked to build up a "record" for a stranger to the trust, he co-operated with the stranger in the belief that his beneficiary was not informed.

IV.

Award of Attorney's Fees and Costs Improper.

1. Appellees have failed to cite a single case where a federal court has granted attorney's fees to a plaintiff in interpleader, where the claim has been objected to on the ground of conflict with *the law of the forum.* In the only cases where the objection has been made, the award has been denied.

> *Danville Bldg. Assn. etc. v. Gates, et al.,* 66 Fed. Supp. 706, D. C., E. D. Ill. (1946);
>
> *Ill. Bankers Life Assur. Co. v. Blood, et al.,* 69 Fed. Supp. 705, 707, D. C. N. D. Ill. E. D. (1947) (App. Op. Br. p. 44).

While it is true that this and other Federal Courts have sanctioned attorneys' fees to the plaintiff in interpleader (Baldwin Brief, p. 23), in none of the cited cases was the instant point raised. On the contrary this Court has given clear indication that the rule as to attorneys' fees in federal interpleader is to be the same as the state rule. In *Massachusetts Mutual Life Ins. Co. v. Morris,* 61 F. 2d 104, 105 (1932) (C. C. A. 9th) (Baldwin Brief, p. 23), this Court quotes with approval the following:

> " 'Nothing in the language or in the history of this essentially jurisdictional act evidences an intent that the rules as to costs and attorneys' fees in a statutory interpleader should be different from those that prevail in the ordinary equity interpleader *whether it be in the federal or state courts.*' "

2. As pointed out previously, *Van Orden v. Anderson,* 122 Cal. App. 132, 92 Pac. 572 (1932) (Baldwin Brief, p. 24) was not a case of interpleader by a trustee, since the trust there had already terminated. By the same token,

attorney's fees were awarded to the plaintiff—not as a plaintiff in interpleader, but to one who while acting as trustee had, prior to the interpleader action, rendered valuable services to the trust. The award was justified under Sections 2250 and 2273 of the Civil Code of California. Appellees do not bring themselves within the narrow scope of the *Van Orden* case, nor do they claim under the Civil Code of California. In any event the decision of the California Supreme Court in *Pacific Gas and Electric Co. v. Nakano, et al.,* 12 Cal. 2d 711, 715, 87 P. 2d 700 (1939) (App. Op. Br., p. 45) settles the California law denying attorney's fees to the plaintiff in interpleader.

3. *Prudential Ins. Co. of America v. Carlson,* 126 F. 2d 607 (C. C. A. 10th, 1942), cited by appellees (Baldwin Brief, p. 25) stands only for the proposition as noted—and ignored by appellees—that:

> ". . . failure of the Court to apply the *foreign* law may not be assigned as error for the first time on appeal."

It is not thought that California law is *foreign* to a federal court sitting in California.

The dictum in *Great American Insurance Co. v. Glenwood Inv. Co.,* 265 Fed. 594 (C. C. A. 8th, 1920), cited by appellees (Baldwin Brief, p. 25) can have little weight, having been decided long prior to the paramount decision in *Erie Railway Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188 (1938), and the cases stemming therefrom. Thus, for example, in *United States v. Certain Parcels of Land, etc.,* 144 F. 2d 626, 630 (C. C. A. 3rd, 1944), it is stated:

> "Appellate Courts, of course, have always remanded cases when the trial courts have applied the law of the wrong jurisdiction. (*Klaxon v. Stentor*

Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477.) We think this should be done in this case, and it is immaterial that it was tried in the District Court on the theory that Pennsylvania law was to be applied. The appropriate law must be applied in each case and upon a failure to do so, Appellate Courts should remand the cause to the trial court to afford it opportunity to *apply appropriate law, even if the question was not raised in the court below. Pecheur Lozenge Co. vs. National Candy Co.,* 315 U. S. 666, 62 S. Ct. 853; 86 L. Ed. 1103."

V.

The Transcript.

In a desire to have a transcript prepared which would be fair, not only to appellant but to each of the appellees and the reviewing Court, appellant requested preparation of the entire certified record. While it is true that formal portions of certain documents might have been eliminated, in numbers of instances even these are material to a correct picturing of the factual situation. Thus the distribution of copies on certain letters, *e. g.* Exhibits No. 10 [Tr. p. 108] and No. 18 [Tr. p. 119] to the Baldwin Affidavit, and the omission of distribution, *e. g.* Exhibit No. 11 to Baldwin Affidavit [Tr. p. 109] is vital. So, too, it was felt that inclusion of headings of letters facilitated a quick grasp of sequence. Likewise, where the same documents were attached to different affidavits, it was believed all should be reproduced to preserve continuity, and to permit rapid observation of the omissions of one affiant and the inclusions of another. If appellant has erred in the foregoing particulars, apology to this Court is freely made.

However, appellant is shocked and amazed at the criticism by appellees (Baldwin Brief, pp. 27, 28) of inclusion in the record of portions thereof referred to by appellant, portions referred to by appellee Baldwin, and portions referred to by appellee Rasberry. The following table is illustrative:

A. *Affidavit of Letha Metcalf.*
Reference: Appellant's Opening Brief, page 43.

B. *Additional Affidavit of Letha Metcalf.*
Reference: This Brief, page 9.

C. *Affidavit of Rasberry* [Tr. pp. 29-68] *exclusive of Exhibit "C"* [Tr. p. 53 and Tr. pp. 34, 38, and 43]:

	Cited in		
Transcript	Appellant's Opening Brief	Baldwin's Brief	Rasberry's Brief
Whole Affidavit (pp. 29-68)	p. 36		
All Exhibits (pp. 44-68)			p. 7
p. 30	p. 3		
p. 32		pp. 10, 11	
p. 33		p. 11	
pp. 35-37		pp. 11, 15	p. 3
p. 39	p. 3		pp. 7, 8
p. 40			p. 8
pp. 41-42			pp. 7, 8
p. 44			p. 7
p. 45			p. 3
p. 54		pp. 11, 15	pp. 3, 7
p. 55		pp. 11, 15	pp. 3, 7
p. 56			pp. 7, 8
p. 57			p. 7
p. 59			p. 8
pp. 63, 65, 66			p. 7

D. *"A large portion of the lengthy affidavit of Arthur D. Baldwin"* [Tr. pp. 68-165].

Suffice it here to call attention to the fact that Appellant's Opening Brief (p. 36) invited attention to the entire body of the affidavit; the Rasberry Brief (p. 7) refers to all of the 37 exhibits to the affidavit, and a casual glance makes clear that the Baldwin Brief is replete with reference to that "lengthy" document (see Baldwin Brief, pp. 2, 11, 12, 13, 14, 15, 16, and 19).

A wise law school professor once said:

> "If you're weak on the law, argue the facts, and if you're weak on the facts, argue the law."

He might well have added:

> "If you're weak on the law *and* the facts, criticize the transcript."

VI.
Conclusion.

The briefs of appellees confirm appellant's belief that this is a case "of first impression." The declaration of this Court that a trustee's duty of loyalty bars him from abandoning his beneficiary to interplead with a hostile stranger will be of vital import—not in this case alone, but will serve to strengthen confidence in the whole trust relationship so fundamental in the complex economic fabric of the nation. The apparent absence of *bona fide* doubt as to the disposition of the funds at issue, and the obvious cooperation between trustee and lawyer to the detriment of beneficiary and client serve further to demonstrate the

need for reversal. Apart from the terms of the trust itself, appellees have misconceived the nature of federal interpleader in assuming there is some federal-given right to attorneys' fees. As demonstrated by the case law, the right is governed by the rule of the forum—which bars the award.

The judgment should be reversed with directions to dissolve the injunction, dismiss the action, and order the return of the attorney's fees and costs.

Respectfully submitted,

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